IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 9TH JANUARY 2007 / 19TH PAUSHA 1928

MFA.No. 810 of 2002(B)

WCC.181/1998 OF THE COURT OF THE COMMISSIONER FOR WORKMEN'S COMPENSATION (DEPUTY LABOUR COMMISSIONER),KOZHIKODE

APPELLANT: 2ND OPPOSTIE PARTY

THE ORIENTAL INSURANCE CO.LTD.,
DIVISIONAL OFFICE, HOSPITAL ROAD, CALICUT
REPRESENTED BY THE MANAGER, REGIONAL OFFICE,
NORTH RAILWAY STATION ROAD, ERNAKULAM,
COCHIN - 682 018.

BY ADV. SRI.M.JACOB MURICKAN

RESPONDENTS: APPLICANT AND 1ST OPPOSITE PARTY

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1. KUTTAN NAIR, S/O. ACHUTHAN NAIR,
KOLAPPURATHU THAZHE KUNIYIL HOUSE, KINALOOR
AMSOM, MUNDAKKARA DESOM, KOYILANDY TALUK.

2. E.K.GOVINDAN, 'KALLIANI',
KAIRALI ROAD, BALUSSERY.

BY ADV. SRI.B.V.JOY SANKER

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 20/12/2006, THE COURT ON 09/01/2007 DELIVERED THE FOLLOWING:

C.M.P.NO.4761/2002 IN M.F.A.NO.810/2002

DISMISSED

9/1/2007 SD/- K.T.SANKARAN, JUDGE

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K.T.SANKARAN, J.

M.F.A.NO. 810 OF 2002 B

Dated this the 9th day of January, 2007

JUDGMENT

Sankaran, J.

In this appeal filed by the Oriental Insurance Co.Ltd., the appellant challenges the jurisdiction of the Commissioner for Workmen's Compensation to pass an order allowing recovery from the appellant, the compensation awarded to the workman, the first respondent.

2. The first respondent herein, applicant before the Commissioner, was working as a mahout of the elephant by name "Dhananjaya" owned by the second respondent herein. On 28.3.1998, while the applicant was engaged in his work as a mahout at a festival of Maniyoor Temple, he fell down while he was getting down from the top of the elephant as he was kicked by the elephant. The applicant sustained injuries. He was treated as an inpatient in the Medical College Hospital, Kozhikode

from 28.3.1998 to 25.4.1998. He had to undergo a surgery, as he sustained fracture of his right femur. The Assistant Professor of Surgeon, Medical College Hospital, Kozhikode certified that the applicant sustained disablement and it was assessed at 30%. A sum of Rs.2 lakhs was claimed by the applicant as compensation. The employer, who is the owner of the elephant, as well as the insurance company were made opposite parties before the Commissioner. The Commissioner found, on evidence, that the applicant is entitled to compensation of Rs.45,494.40.

3. The insurance company was arraigned as one of the opposite parties on the ground that Ext.R2 insurance policy was available to cover the accident. The insurance company contended in the written statement that since no policy was issued indemnifying the employer under the Workmen's Compensation Act, the insurance company is not liable to pay compensation. The Commissioner found that Ext.R2 policy covers the claim for compensation by the mahout under the Workmen's Compensation Act and, therefore, held that

the insurance company is liable to pay the amount of compensation.

4. Learned counsel for the appellant contended that the Commissioner has no jurisdiction to fix the liability on the insurance company. Ext.R2 policy is not a policy under the Workmen's Compensation Act. The policy was intended for the protection of the elephant and to compensate its owner. The policy does not cover the claim for compensation for the injury sustained by the employee during the course of employment. The counsel submitted that in respect of the policies issued to cover claims under the Workmen's Compensation Act, it would be so specified and the policy available in this case is not such a policy. He also submitted that in the case of policy issued to cover workmen's compensation, there would be no mention of any sum assured as the compensation is to be fixed by the Commissioner under the Workmen's Compensation Act, whereas in Ext.R2 policy the sum assured is mentioned, which indicates that Ext.R2 is not a policy which can be availed of by the workman in respect of the accident. The counsel also contended that the

insured has not approached the insurer and, therefore, the mahout is not entitled to file an application before the Commissioner. He contends that the remedy, if any, of the mahout is to approach the civil court.

5. Learned counsel for the first respondent-applicant contended that there is no difference between Ext.R2 policy and any other policy. There can be no dispute that the employer is liable. If so, the insurer is liable to indemnify the employer. The counsel also relied on the decisions in **New India Assurance Co. Ltd**. V. **R.Shridhara and another** (1991 ACJ 204) and **United India Insurance Co. Ltd.** V. **Vasudevan** (1989(1) KLT 366(F.B.)).

6. Ext.R2 policy shows that the certificate of insurance is issued "for the insurance of elephant for the members of All Kerala Elephant Owners' Association". As against the column "Name of the insured", it is mentioned as "All Kerala Elephant Owner's Association" and "K.Govindan Chettiar". The period of insurance is from 19.6.1997 to 18.6.1998. Name of the elephant and the description of the

elephant are shown in the policy. As against the column "purpose for which used", it is recorded as "temple and timber". The total sum assured is Rs.4 lakhs. Under the head "third party liability cover", there is a column as "mahout coverage" and under the head "name of the mahout", it is recorded as "2 unnamed mahouts". Ext.R3 is the agreement on the basis of which the policy was issued. The agreement was executed between All Kerala Elephant Owners' Association and the insurance company and it is termed as "master policy agreement for group elephant insurance scheme for the members of All Kerala Elephant Owners' Association". In the agreement, paragraph 7 covers "third party liability" and there is "mahout cover" as well. The Assistant Divisional Manager of the Company, who was examined as RW1, admitted in evidence that the policy was given for covering personal accident injury and death of two mahouts employed by Govindan Chettiar and that the mahouts are insured for a sum of Rs.2 lakhs each. He also stated in evidence that the policy in question covers injuries sustained by mahouts due to attack made by the elephant.

7. Section 2(1)(n) of the Workmen's Compensation Act defines 'workman'. Sub-clause (ii) therein is relevant, which is extracted below:

> "2. Definitions: (1) …….
>
> (n) "workman" means any person who is -- …….
>
> (ii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or implied, oral or in writing; but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants or any of them."

Schedule II of the Workmen's Compensation Act contains the "list of persons who, subject to the provisions of Section 2(1) (n), are included in the definition of workmen". Entry (xxii) therein reads thus:

> "The following persons are workmen within the meaning of section 2(1)(n) and subject to the provisions of that section, that is to say, any person who is -- ……
>
> (xxii) employed in the training, keeping or working of elephants or wild animals;"

A mahout is certainly a person who comes under the category mentioned in entry (xxii) of Schedule II of

the Act. The Chambers Dictionary defines mahout as " the keeper and driver of an elephant". Webster's New Dictionary and Thesaurus gives the meaning of mahout as "elephant driver".

8. Section 3(5) of the Act reads thus:

> "3. Employer's liability for compensation: ……
>
> (5) Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a Civil Court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any court of law in respect of any injury –
>
> (a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or
>
> (b) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act."

Section 22 of the Act provides for the form of application to be filed before the Commissioner. Section 23 states that the Commissioner shall have all the powers of a civil court under the Code of Civil Procedure , 1908, for the purpose of taking evidence on

oath and of enforcing the attendance of witnesses and compelling the production of documents and material objects and the Commissioner shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. Section 19 provides for reference to Commissioners which reads thus:

> "19. Reference to Commissioners:- (1) If any question arises in any proceedings under this Act as to the liability of any person to pay compensation (including any question as to whether a person injured is or is not a workman) or as to the amount or duration of compensation (including any question as to the nature or extent of disablement), the question shall, in default of agreement, be settled by a Commissioner.
>
> (2) No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act."

9. The scheme of the Act is that the Commissioner has to decide the question as to the liability of any person to pay compensation and no civil court shall have jurisdiction to settle, decide or deal with any question which is required to be settled, decided or dealt with by the Commissioner. Section 3(5) provides

that no suit for damages shall be maintainable by a workman if he has instituted a claim for compensation before a Commissioner. The Workmen's Compensation Act is a legislation providing for social security and it is a welfare legislation. The purpose of the Act is to protect the workmen. If two interpretations are possible, that interpretation which is in favour of the workman shall be preferred. The Act makes the employer liable to compensate the workman in the manner indicated in the Act. Schedule I of the Act categorises the injuries; Schedule II provides the list of persons who are included in the definition of workman. Schedule III contains the list of occupational deceases and Schedule IV contains factors for working out lump sum equivalent of compensation amount in case of permanent disablement and death. A workman who has sustained injuries in the course of employment is not bound to approach the civil court for recovering compensation. He can file an application under Section 22 of the Act. The Commissioner has jurisdiction to settle the question as to the liability of <u>any person</u> to pay compensation. Section 3(5) would indicate that the workman can opt to file an

application under Section 22 of the Act or to file a suit, provided the suit is not barred under Section 19 (2) of the Act. If the workman institutes a suit for damages, he is not entitled to file an application under the Workmen's Compensation Act. If a workman has instituted a claim for compensation before the Commissioner, he is not entitled to institute a suit for damages. This provision provides for the election of the forum by the workman. It does not provide for a defence for the employer to contend that the workman should have resorted to the remedy which he has not resorted to. The option lies with the workman and not with the employer. The expression "the liability of any person" occurring in Section 19 of the Act confers jurisdiction upon the Commissioner to decide the question as to whether the insurer is liable to pay the compensation amount. The question of insurance coverage is not alien to the scope of enquiry before the Commissioner, as is evident from Section 14 of the Act. Section 14 applies in the case of insolvency of the employer or if the employer is a Company, in the event of the Company having commenced to be wound up. In the contingencies mentioned in Section 14, by a

fiction, the workman shall have the rights of the employer. The liability of the insurer does not vanish in any such contingency and the workman is entitled to enforce the right of the employer as against the insurer.

10. In **United India Insurance Company Ltd. Vs. Vasudevan: 1989 (1) K.L.T. 366**, the Full Bench held that in proceedings under Section 22 of the Workmen's Compensation Act, the Commissioner is empowered to direct the insurer to pay the compensation as provided for, even in cases where Section 14 of the Act has no application. The Full Bench was dealing with the case of a claim of the dependent of a workman who died as a result of a motor accident and the question which arose was whether the Workmen's Compensation Commissioner can direct the insurer to pay the amount awarded as compensation. The Full Bench held thus:

> "The scheme thus provides for absolute liability of the employer in case of accidents arising out of and in the course of the employment of the workman. Section 19 constitutes the Commissioner as the sole authority to determine this liability of the employer and to enforce that liability incurred under the Act. The civil court's jurisdiction is totally excluded from this liability. Section 19 (1) is wide enough to

> confer jurisdiction on the Commissioner to determine a question arising in any proceeding under the Act as to the liability of 'any person' to pay compensation as provided for by the Act. It is not restricted to determination of the liability of the employer alone."…… "We are clearly of the view that under the Workmen's Compensation Act, in proceedings under S.22 thereof the Commissioner is empowered to enforce the liability of the employer to pay the compensation to the employee by directing the insurer to discharge the liability in terms of the policy which covers the liability."……. " In the light of what has been discussed, we hold that in proceedings under S.22 of the Workmen's Compensation Act, the Commissioner is empowered to direct the insurer to pay the compensation as provided for even in cases where S.14 of the Act has no application."

In the light of the principles mentioned above, I am not inclined to accept the contention put forward by the counsel for the appellant that the Commissioner has no jurisdiction to direct recovery of the amount of compensation from the insurer.

11. The contention of the appellant that Ext. R2 policy does not cover the claim for compensation by mahout and also that a group insurance policy cannot be availed of by an individual workman in respect of the injury sustained by him, is also without substance. The terms of Ext. R2 policy and Ext. R3 agreement would clearly indicate that the insurer is liable to

compensate the insured in respect of the personal injury sustained by the mahout in the course of his employment under the insured as a mahout. Whether it is a group insurance or individual insurance, it does not affect the coverage and the insurer is not entitled to dispute its liability on the ground that it is a group insurance. The purpose of insurance is clear from the agreement. Whether the All Kerala Elephant Owners' Association approached the insurance Company or whether the individual owner of the elephant approached the insurance Company for insurance coverage is not at all relevant in fixing the liability of the insurance company as an insurer. The question is whether insurance company is liable at all, in terms of the policy. Such liability is not dependent on whether it is individual policy or group policy. The nomenclature of an insurance policy is not always decisive and the rights conferred on the workmen under the Workmen's Compensation Act cannot be taken away by the nomenclature of an insurance policy. In **New India Assurance Co. Ltd. V. R.Shridhara and another : 1991 ACJ 204**, the Karnataka High Court considered a similar question and held thus:

> "That the insurance company has different types of policies including the one under the provisions of the Workmen's Compensation Act, is not a defence to absolve itself from paying under the miscellaneous group insurance as in the instant case. That will be helping technical defence which this Court will not countenance."

12. I am in agreement with the view taken by the Karnataka High Court. For the reasons stated above, I hold that the contention of the appellant that Ext. R2 policy is not sufficient to cover the claim for compensation for the injury sustained by the mahout in the course of his employment, is unsustainable.

In the result, the Miscellaneous First Appeal is dismissed with costs.

(K.T.SANKARAN)
Judge.

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K.T.SANKARAN, J.

M.F.A.NO. 810 OF 2002

JUDGMENT

9th January, 2007